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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 55

WILLIE WADE, JR.,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1.

Respondents Have Advanced No Supportable Reasons for Denying Petitioner His Trial Transcript for Purposes of Collateral Review.

Distilled to its essence, respondents' response to petitioner's contention that he has a right to a transcript for collateral attack is an appeal to this Court to disregard the clear application of the Fourteenth Amendment to petitioner's case because of (1) the potential financial burdens on the State in making a transcript available, and

(2) the potentially disruptive effect on prison discipline. Respondents are arguing a case not before this Court. The circumstances here requiring access to a transcript are very narrow: Petitioner appealed his conviction, a trial transcript was prepared and is presently available and in the possession of the State, and a copy of the transcript was provided by the State to petitioner's co-defendant. It is neither necessary nor appropriate for this Court in this proceeding to consider a right to a transcript in collateral proceedings of a prisoner who never appealed his original conviction and for whom no trial transcript was ever prepared. Accordingly, the statistics cited by respondents at pages 16-17 of their brief are irrelevant for the purposes of this proceeding.[1]

With respect to the imagined problem of maintenance of prison discipline, if this be grounds for denying *petitioner* access to his existing trial transcript, it would equally be grounds for denying such access to *every prisoner,* regardless of whether he had a co-defendant or not, and regardless of whether he was furnished a copy of his transcript for direct appeal. Surely the State of California does not mean to contend that in order to maintain prison discipline it is necessary to preclude a prisoner after his conviction from seeing a copy of a trial transcript which has

[1] It should be kept in mind that in the overwhelming majority of the states the question presented here could not arise, since most state statutes or court rules draw no distinction between defendants tried singly and those tried with other defendants with respect to providing free transcripts to an indigent defendant for purposes of appeal in a felony case. Since the filing of petitioner's opening brief, Delaware and Oregon have advised counsel for petitioner that they administratively construe their statutes or court rules not to afford each co-defendant a copy of the trial transcript and Appendix B to petitioner's opening brief should be revised accordingly.

been furnished to him. If the prisoner who has already been furnished a copy of his transcript in connection with his direct appeal may subsequently peruse the same for the purposes of instituting collateral proceedings, there is no basis for denying a transcript to a prisoner such as petitioner in the name of prison discipline.

Respondents also attempt to draw a parallel between providing attorneys to initially brief and argue petitions for collateral relief and providing a transcript for collateral proceedings. The argument is obviously fallacious since a petition for collateral relief can be filed any number of times and the burden imposed by providing counsel each time is clear whereas copy of a trial transcript need be provided only once and is substantially less expensive than an attorney.

2.

The Appointment of Appellate Counsel for Petitioner in Connection With His Initial Appeal Was Not a Substitute for His Constitutional Right to His Trial Transcript.

Respondents contend that since petitioner was represented by court-appointed counsel in connection with the initial appeal of his conviction, he had the full "access" to his trial transcript which the Constitution requires be made available to him. Were that so, *Douglas* v. *California,* 372 U.S. 353, holding that counsel has to be provided an indigent defendant on appeal, would have overruled, or at least rendered moot, the line of transcript cases stemming from *Griffin* v. *Illinois,* 351 U.S. 12. Obviously, such was neither the intent nor the effect of *Douglas,* and this Court has never suggested that the mere existence of counsel is an adequate substitute for the right to a transcript.

Furthermore, the appointment of appellate counsel for petitioner could not, under the circumstances of the present case, in any event be considered as an adequate substitute for the furnishing to petitioner of his trial transcript. At the very outset of direct appellate review, and before appellate counsel was appointed, petitioner had no transcript or access thereto to make corrections in the transcript before it was certified as correct for purposes of appeal. The ability to review and correct a trial transcript is essential to the proper presentation of an appeal, and respondents have made no effort to argue otherwise. In addition, after his conviction was affirmed, petitioner had no opportunity to review his transcript and determine whether to petition for a rehearing or petition for hearing before the California Supreme Court.[2]

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[2] Respondents sought in their brief to demonstrate that petitioner was actively represented by counsel until the time for filing such petitions had expired by supplying a certificate of the Clerk of the California Court of Appeal for the Second Appellate District to the effect that (i) there was no indication of record that the petitioner or his court-appointed counsel requested the court to relieve him as counsel on appeal, and (ii) that counsel was not in fact relieved by the court as counsel of record prior to the time the remittitur was issued. In view of such certification, it appears that petitioner's counsel was not formally relieved as counsel during the appellate process. However, under the circumstances, counsel for petitioner believes himself obligated to file as an appendix to this brief a statement as to certain correspondence of which he is aware by petitioner's court-appointed appellate counsel to the California Court of Appeal (1) requesting advice prior to briefing and argument of the case as to whether he should be relieved as counsel, and (2) indicating immediately after the decision was rendered and while there was adequate time to file petitions for rehearing or hearing before the California Supreme Court that such counsel had no intention of filing any such petitions.

3.

Petitioner Has Neither Waived His Claim to His Transcript Nor Been Remiss in Asserting His Claim Before the California Courts.

Respondents contend that petitioner waived his right to a copy of his trial transcript in at least two ways. First, respondents contend that petitioner never told the State of his desire for a transcript. The very fact that petitioner's counsel had to borrow a copy of the transcript from the Attorney General—the chief law enforcement officer of the State—put the State on notice of petitioner's lack of a transcript. At least from that point on, the State, and not the petitioner, had the burden to see that petitioner's constitutional rights were protected, and petitioner should not be charged with waiver of his rights.

Respondents' second argument for waiver is that the record lacks any indication that petitioner objected to not having his own copy of the trial transcript prior to 1965. "But nonassertion of a constitutional right in court proceedings in which it would be appropriate to make such assertion is not necessarily a waiver of such right. As appellee [Warden, San Quentin Prison, California] himself concedes, a consitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before. A matter is of such nature that it could not have been raised before if the person asserting it did not have knowledge of the facts upon which it is based, or if, for some other adequate reason, such person was prevented from asserting it." *Egan* v. *Teets,* 251 F.2d 571, 576 (9th Cir. 1957), *cert. den.* 352 U.S. 853. *See also, Preston* v. *Municipal Court,* 188 Cal.

App. 2d 76, 10 Cal. Rptr. 301, 304 (1961). It is submitted that under the circumstances of this case, particularly those reflected in the affidavit of counsel for petitioner attached hereto, the circumstances justify the petitioner not having raised the issue during his appeal. Cf. *Dowd* v. *Cook*, 340 U.S. 206.

Respondents also urge that petitioner has not raised the issue of the constitutional validity of rules 10(c) and 35 prior to his opening brief in this Court. The opposite, however, is the case. In petitioner's motion and affidavit for the issuance of records directed to the California Court of Appeal (A. 19), petitioner stated:

> "The Honorable courts jurisdiction to issue the records in this case is based in the facts that this court rendered it's decision in the above numbered case on August 17, 1961, Affirming the Los Angeles Superior Court order denying motion for new trial, thus petitioners timely notice of appeal gives him the right to there reporters transcript, further as petitioner is without funds to pay for such transcripts, they must be issued at the expense of the state, even though the ten day period for appeal has elapsed."

Then, in his Petition for a Writ of Habeas Corpus to the Supreme Court of California (A. 25), petitioner stated his allegation as follows: "Petitioner is at present being denied due process of law and equal protection of the law by the illegal restrainment of his trial records, by the People of the State of California." Petitioner then indicated that he wanted the court to issue records which specifically included "Records of the trial/reporters transcripts", and that he had no funds with which to pay the costs of securing

those records. Petitioner also stated that "A certified copy of the aforesaid records, were issued to the petitioners co-defendant Joe Lewis Pollard . . . " (A. 25).

Having exhausted his remedies in the state courts, petitioner then went to the Federal courts. In his petition for Writ of Habeas Corpus, petitioner says that his basic allegation is that he is being denied due process and equal protection of the law "by the restrainment of my records" (A. 10). In response to question 11, which asks him to set forth the facts which support his contention, he states: "The laws of California requires that an indigent person may receive a free copy of a trial transcripts if he timely appeals, i complied with the law and timely appeal my conviction but could recieve a free copy of the Records as an indigent person" (A. 5). See also, petitioner's "Traverse in Opposition to the Return to the Order to Show Cause and Argument Points and Authorities" (A. 40).

Finally, in his petition for certiorari, petitioner stated at the very outset of his argument:

> "Petitioner's case is rather unusal, in the respect that he filed a timely notice of appeal, which according to this Court's decision in *Griffin* v. *Illinois,* 351 U.S. 12, entitled him to a free copy of the trial transcripts if he is unable to pay for them.
>
> Under the Rules of Court in the State of California, Rule 10 (c) and 35 (c), provides that every convicted person of crime is entitled to a free transcript of the proceedings for purpose of appeal. It is provided that where two or more defendants are convicted in the same case and the judgment of death is not rendered, one free copy is made available to the defendants to share.

In the present case petitioner was convicted with one Joe Lewis Pollard, who also filed a notice of appeal, but prior to the records being filed in the Appellate Court dropped his appeal. It is alleged that the records were nonetheless forwarded to him. However, petitioner nor any one connected with his appeal has seem the records. At this time and all times prior to the filing of the opinion by the court of appeals, Mr. Pollard has never shared the records with petitioner, nor is he to petitioner's knowledge under any kind of order from the Court to share the records with petitioner ....

Rule 10 (c) and 35 (c) does not purport to hold that in all cases in which two are more defendants is jointly tried and convicted there is to be no more than one copy of the records made available irrespective of the ability to pay for them. This petitioner believes to be a practice of 'invidious discrimination' on the part of the State of California. Such a practice which this Honorable Court sought to strike down in *Griffin* vs. *Illinois*, supra; and *Hardy* v. *United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed. 2d 331.

Petitioner believes, that had not the invidious discrimination then practice been subjected to petitioner, he would not now be filing this petition in this Honorable Court. That had he been furnished with a copy of the transcript at the time of his appeal, he would have had it for the purpose of filing his petition for a writ of habeas corpus, that he now seek the records to prepare" (pp. 6-8).

This Court has in the past recognized that prisoners acting as their own counsel are not to be held to the same standards as lawyers in preparing their petitions (see,

Price v. *Johnston*, 334 U.S. 266, 292). Certainly, petitioner has done all that can in good conscience be required of him in bringing to the attention of both the California courts, the lower Federal courts, and this Court his claim that he has been unconstitutionally denied his right to his trial transcript. Petitioner should not be required to make any further showing before a copy of his transcript is made available to him, failing which he should be discharged. See *Dowd* v. *Cook*, 340 U.S. 206, 210.

Respectfully submitted,

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